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STATE OF WASHINGTON

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

BY: AP
DEPUTY

OLYMPIC STEWARDSHIP FOUNDATION, et al., CITIZENS'
ALLIANCE FOR PROPERTY RIGHTS JEFFERSON COUNTY,
CITIZENS' ALLIANCE FOR PROPERTY RIGHTS LEGAL FUND,
MATS MATS BAY TRUST, JESSE A. STEWART REVOCABLE
TRUST, and CRAIG DURGAN, and HOOD CANAL SAND &
GRAVEL LLC dba THORNDYKE RESOURCE,

Petitioners,

v.

STATE OF WASHINGTON ENVIRONMENTAL AND LAND USE
HEARINGS OFFICE, acting through the WESTERN WASHINGTON
GROWTH MANAGEMENT HEARINGS BOARD; STATE OF
WASHINGTON, DEPARTMENT OF ECOLOGY; and JEFFERSON
COUNTY,

Respondents,

and

HOOD CANAL COALITION,

Respondent/Intervenor.

**PETITIONERS CITIZENS' ALLIANCE
FOR PROPERTY RIGHTS JEFFERSON COUNTY, et al. ANSWER
TO AMICUS BRIEF OF FUTUREWISE AND WASHINGTON
ENVIRONMENTAL COUNCIL**

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I. INTRODUCTION

Petitioners Citizens' Alliance for Property Rights Jefferson County, Citizens' Alliance for Property Rights Legal Fund, Mats Mats Bay Trust, Jesse A. Stewart Revocable Trust, and Craig Durgan (collectively "CAPR") here answer certain arguments advanced by Futurewise and the Washington Environmental Council in their joint Amicus Brief in support of Respondents.

CAPR answers the claim of Amici that Respondents Department of Ecology ("Ecology") and Jefferson County ("County") met the conjoint requirements of WAC 173-26-201(3)(c) and (d) to inventory shoreline conditions and to analyze shoreline issues of concern. Particularly, CAPR argues that WAC 173-26-201(3)(d)(i)(A)(III) ("Identify specific measures necessary to protect and/or restore the ecological functions and ecosystem-wide processes") requires a significantly more in-depth analysis of what developments in the shoreline are actually causing harm to ecological function than the County's Shoreline Master Program ("SMP") and its supporting documentation do before imposing one-size fits-all buffers (i.e., before appropriating conservation easements from property owners by legislative fiat). This was argued by both CAPR and its Olympic Stewardship Foundation co-petitioners before the Growth Management Hearings Board ("Board"), but the Board dismissed these claims. Dismissal

of these claims was clear error by the Board and should be reversed by this Court.

II. ARGUMENT IN ANSWER TO AMICI FUTUREWISE AND WASHINGTON ENVIRONMENTAL COUNCIL

A. PRELIMINARY COMMENTS

Futurewise and the Washington Environmental Council (hereinafter collectively “Futurewise”) claim the County and Ecology did the work required by the statutes and rules and, therefore, the County and Ecology are entitled to impose large buffers and setbacks on all properties in the shoreline jurisdiction of Jefferson County¹ — and do so in a constitutionally valid manner. Petitioners disagree.

Futurewise cites examples purporting to show the thoroughness of the Final Shoreline Inventory and Characterization Report – Revised 2008 (“Inventory”). The method of Futurewise is like that used by the County in

¹ Jefferson County Code (“JCC”) 18.25.270(4)(e): “Standard Buffer. The standard buffer shall be measured landward in a horizontal direction perpendicular to the ordinary high water mark (OHWM) of the shoreline water body, and is a three dimensional space that includes the airspace above, as follows:

(i) Marine Shores. A minimum buffer of 150 feet shall be maintained in all shoreline environments.

(ii) Lake Shores. A minimum buffer of 100 feet shall be maintained in all shoreline environments.

(iii) Stream/River Shores. A minimum buffer of 150 feet shall be maintained in all shoreline environments.”

Additionally, JCC 18.25.270(4)(d) applies a 10 foot building setback from the buffers.

its response brief with respect to economic considerations. (See CAPR Reply Brief at 5 and 6 for examples and discussion.) The method is to cite particular pages of the record, in Futurewise's case the Inventory, and assert that what is presented there satisfies what is required, but without detailing what is actually presented. Petitioners must work to fill this gap at considerable page cost.

A further problem is created by the County and its supporting Amici with respect to the record, specifically the maps accompanying the Inventory. See Inventory at 4-1; AR 6336.

Maps depicting inventory information are provided in the map folio that accompanies this report (Appendix C). Maps 8 through 28 depict shoreline reach attributes as indicated in Table 4-1.

However, the "Appendix C" maps produced by the County in the Administrative Record ("AR") appear to be from an earlier version of the Inventory. For example, Maps 11 and 12, cited by Futurewise at 11, n. 30, as present at AR 6520 and 6521, correspond to those found on the County website at

http://www.co.jefferson.wa.us/commdevelopment/PDFS/MPupdate/Maps_July2005/HoodCanal_11.pdf and
http://www.co.jefferson.wa.us/commdevelopment/PDFS/MPupdate/Maps_July2005/Ludlow_12.pdf

These maps are described on the website as *2005 Inventory*
Maps at

<http://www.co.jefferson.wa.us/commdevelopment/ShorelineInventory.htm>
#November2008FinalICR.² Further, this same webpage, at a point above the 2005 map links, give what is described as the Appendix C - Map Folio. These appear to be the proper 2008 *revised* Inventory Appendix C maps and are somewhat more complete.³ For example, the 2008 Maps 11 and 12 do show reaches having bulkheads as particularly mentioned by Futurewise at 11 of its brief, something not shown on the 2005 versions in the record cited by Futurewise. Nonetheless, showing where bulkheads are on a map is simply inventorying, not analyzing. What is *claimed* to be “analysis” is found in the text of the Inventory (which does appear to be correctly produced in the administrative record for this case).

B. REVIEW OF AMICI CLAIMS REGARDING WHAT THE COUNTY DID

At 11 of its brief, Futurewise alleges that

[t]he county had consultants prepare a *Final Shoreline Inventory and Characterization Report – Revised* that included the required inventories and analysis. For example, the SMP guidelines ... require the identification and analysis of shoreline structures such as bulkheads.

Footnotes omitted.

² The Maps produced at AR 6520 and AR 6521 — the 2005 maps — are part of the Record submitted *by the County* as attached exhibits to its Prehearing Brief of Respondent Jefferson County which begins at AR 5855. See, Index to the Certified Record filed by the Board with this Court

³ At page ECY010503 and ECY010504 of the documents produced to the Board by Ecology, 2007 versions of these maps appear. (CAPR has not found the final 2008 maps in the 27,347 pages Ecology produced to the Board; nor has CAPR found them in the index of documents produced to the Board by Jefferson County.) The 2007 maps look to be essentially the same as the final 2008 maps.

Inventories, identifications, and information gathering are one type of thing, analysis is another. Ecology's own rule, WAC 173-26-201, explicitly makes the distinction. Examples are multiple: WAC 173-26-201(2)(c) Basic Concepts, "based on the inventory *and analysis* requirements" (emphasis added); WAC 173-26-201(3)(d) Analyze Shoreline Issues of Concern, "local governments shall analyze the information gathered" (distinguishing information from analysis of that information); WAC 173-26-201(3)(f) "Based on the inventory in (c) of this subsection and the analysis in (d) of this subsection, assign each shoreline segment an environment designation." All find their origin in RCW 90.58.100(1): "(e) Utilize all available information regarding hydrology, geography, topography, ecology, economics, and other pertinent data; (f) Employ, when feasible, all appropriate, modern scientific data processing and computer techniques to store, index, *analyze*, and manage the *information* gathered." Emphasis added.

When construing a rule or statute, each word must be acknowledged. As CAPR previously cited in its Reply:

[A] well-settled principle of statutory construction is that "each word of a statute is to be accorded meaning." *State ex rel. Schillberg v. Barnett*, 79 Wn.2d 578, 584, 488 P.2d 255 (1971). " '[T]he drafters of legislation ... are presumed to have used no superfluous words and we must accord meaning, if possible, to every word in a statute.' " *In re*

Recall of Pearsall–Stipek, 141 Wn.2d 756, 767, 10 P.3d 1034 (2000) (quoting *Greenwood v. Dep't of Motor Vehicles*, 13 Wn. App. 624, 628, 536 P.2d 644 (1975)). “[W]e may not delete language from an unambiguous statute: ‘ “Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” ’ ” *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (quoting *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (quoting *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996))).

State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 196 (2005).

Futurewise, the County, Ecology, and the Board conflate inventorying — an information gathering and systematizing activity — with analyzing the information gathered, even though Ecology’s own rule distinguishes them.

Neither WAC 173-26-020 nor RCW 90.58.030, the definitional sections of the Shoreline Management Act and its rules, define analyze or analysis. “Legislative definitions provided by the statute are controlling. In the absence of a statutory definition, we will give the term its plain and ordinary meaning ascertained from a standard dictionary.” *State v. Sullivan*, 143 Wn.2d 162, 175, 19 P.3d 1012 (2001) (internal citations omitted).

A pertinent definition of analyze, as distinguished from inventory, is found at definitions 1b and 2 of Webster’s Third New International Dictionary 77 (1993): “b: to determine by mental discernment the nature, significance, and relationship of the various parts, elements, aspects, or qualities of (whatever is under consideration) ‹ Balzac ... *analyzed* a society

in which human existence was no longer possible –P.F. Drucker> 2. To weigh or study (various aspects, factors, or elements) in order to arrive at an answer, result, or solution < constantly tries to ~ the motives for his own behavior – *Midwest Jour.*>”

From these definitions it is clear that analysis is an activity applied to “various parts,” “factors,” “aspects,” and “elements” of a situation. These are the things of the inventory — here the information gathered about things along the shorelines of Jefferson County. And this inventory is where the County, with the blessing of Ecology and the Board, stopped, although Futurewise plainly recognizes the requirement for analysis (and distinguishes it from identification). See, e.g., its comment regarding bulkheads at 11 of its brief.

The Final Shoreline Inventory and Characterization Report – Revised analyzed the impacts of bulkheads, identified their location, quantified them where possible, and mapped their location.³⁰ When the County conducts its next comprehensive master program update, this information can be compared with the then current location of bulkheads to determine if the SMP is effectively managing the construction of shoreline bulkheads.³¹

Footnote 30: AR 6299 – 6312, AR 6341 – 6426, ESA Adolphson *et al.*, *Final Shoreline Inventory and Characterization Report – Revised* pp. 3-35 – 3-48, pp. 4-6 – 4-88 (Jefferson County: Nov. 2008); AR 6520, Map 11: Coastal Processes and Modifications -Southeast Jefferson County Jefferson County Shoreline Map Folio (June, 2008); AR 6521, Map 12: Coastal Processes and

Modifications-Northeast Jefferson County Jefferson County Shoreline Map Folio (June, 2008).

Footnote 31: Full inventories of the type done for this update are required for comprehensive shoreline master program updates, the type of update Jefferson County did here. WAC 173-26-201(1)(b).

But “identified their location” and “mapped their location” are part of an inventory, distinct from an analysis. What is meant by “quantified them” is left to the imagination of the reader. Presumably, it refers to the spatial extent of bulkheads as roughly indicated by colored lines on the 2008 maps from Appendix C, since CAPR found no quantitative analysis, e.g., statistical analysis, in the record.⁴

Futurewise further notes the distinction when it quotes the Board’s Final Decision and Order (“FDO”) at 12 of its brief: “[T]he Board found the County completed requirements in WAC 173-26-201(3)(c) to ‘inventory shoreline conditions’ and in WAC 173-26-201 (3)(d) to ‘analyze shoreline issues of concern.’” (FDO at 21 of 93.) Futurewise continues, citing the Board’s claims at 21 to 24 of its FDO that the Respondents have met the requirements of the Guidelines (i.e., WAC 173-26 Part III), rejecting particularly OSF’s argument that “cause-and-effect” analysis is required for a proper analysis. The Board, citing pages 8–9 and 13 (AR 2467-68 and

⁴ With respect to the various versions of these maps, see 3–4 above. The maps at AR 6520 and 6521 do not map bulkheads.

2472) of OSF's pre-hearing brief before it, wrote: "[WAC 172-26-201(3)(d)] does not require, as OSF claims, an analysis of 'various shoreline studies with intent to correlate the 'cause-and-effects' scientific link between the ecological stressors and the degree of development impacts.'"⁵ But if cause-and-effect is not demonstrated by analysis, how is nexus and proportionality of developmental restriction to be shown?

What did the Board find at pages 21 to 24 (AR 7473–76) of its FDO that led it to uphold the SMP against these challenges? Relying on materials from Jefferson County Ordinance # 07-1216-13, the ordinance enacting the SMP (see, n. 67 at AR 7473), the Board bullet points those efforts it finds dispositive of the County meeting the WAC 173-26-201(3) requirements for inventorying shoreline conditions and analyzing issues of concern. For ease of reference, the bullet points are here numbered; footnote numbers in the original are included to acknowledge their presence but space limits their full reproduction here.

1. "Procured professional services from a qualified consulting firm and a science laboratory, established two citizen/stakeholder groups as a [sic] technical and policy advisory committees, and compiled and reviewed 'the most current, accurate and complete scientific and technical information available' per WAC 173-26-201(2)(a)."⁶⁸
2. "Hosted numerous public meetings to verify and assess the work of staff and advisory committees."⁶⁹ In accordance

⁵ CAPR made similar arguments to the Board. See, e.g., AR 2348–51.

with WAC 173-26-201(2)(a) and (3)(a-f), the County prepared an SI [the Inventory], a restoration plan, CIA to assess the collective effects of the SMP.”⁷⁰

3. “Described limitations of the inventory including limitations to field verification,⁷¹ the scope of its inventory,⁷² and the limits of evaluating all shoreline policies and regulations.”⁷³”

4. “Assessed shorelines for impaired shoreline functions and the value of shorelines and created a tool by which policy makers could determine future uses.”

5. “Inventoried each Water Resource Inventory Area (WRIA) to ‘build on the watershed overviews in Chapter 3 and describe conditions directly adjacent to individual shoreline segments (or reaches).’ Specifically, in accordance with WAC 173-26-201(3)(c), Chapter 4 analyzes existing physical characteristics of every ‘reach’ including land use patterns, transportation, utilities, impervious surfaces, vegetation, critical areas, degraded areas, channel migration zones, and archeological resources.”

6. “Analyzed its shorelines, reach by reach, to understand ecological systems.”⁷⁴ Section 3.3.2 described causes and examples of changes to its shorelines, such as nutrient loading,⁷⁵ landslides,⁷⁶ climate change, and their effects on shorelines.”⁷⁷”

7. “Reviewed conditions and regulations in shore-lands and adjacent areas that affect shorelines, such as surface water management and land use regulations.”⁷⁸

8. “Recommended environmental designations for uses along the shorelines.”⁷⁹”

Points 1, 2, and 7 are procedural activities and the Board’s bare statements, even when the footnotes are considered, do not aid in distinguishing

inventory from analysis. Points 3, 4, and 8 fall on the inventory side of the ledger. This leaves points 5 and 6 to be reviewed.

At Point 5 the Board's confusion regarding the difference between analysis and the descriptive activities of inventorying and information gathering is made plain. The Board begins by speaking of inventorying and describing conditions of shoreline reaches. It then commends Chapter 4 of the Inventory because it "analyzes existing physical characteristics of every 'reach' including land use patterns, transportation, utilities, impervious surfaces, vegetation, critical areas, degraded areas, channel migration zones, and archeological resources." These are items in an inventory that as the Board notes is in conformity with WAC 173-26-201(3)(c), the subsection entitled "Inventory shoreline conditions." In fairness, it was the County that titled Chapter 4 Reach Inventory and Analyses, although the chapter is simply a description of the maps found in Appendix C and is bereft of analysis. (Ch. 4 of the Inventory is at AR 6336–457.)

At Point 6, the last remaining, the Board claims that the County "[a]nalyzed its shorelines." As evidence, it cites section 3.3.2 of the Inventory for describing "causes and examples of changes to its shorelines, such as nutrient loading,⁷⁵ landslides,⁷⁶ climate change, and their effects on shorelines.⁷⁷"

Section 3.3.2 of Chapter 3 of the Inventory is entitled Shoreline Processes, Process-intensive Areas, and Alterations. (AR 6292–335.) It is, in fact, an inventory of *processes* described at the ecosystem level as shown by the accompanying section titles: Chapter 3 — Ecosystem Characterization and Ecosystem-Wide Processes; Section 3.3 — Ecosystem-Wide Processes (AR 6286); and Subsection 3.3.2 — Shoreline Processes, Process-intensive Areas, and Alterations (AR 6292). This chapter is at a scale that does not materially aid in evaluating the effects of the small-scale developments typical of the eastern Jefferson County shorelands. This chapter of the Inventory, and particularly subsection 3.3.2 cited by the Board for “analysis,” are in fact a primer on the physical geography of the shorelines of eastern Jefferson County. Perhaps useful as background information for setting up an analysis of sufficient detail to evaluate possible effects of particular types of developments on particular shorelines, but certainly not detailed enough to actually do an analysis showing nexus and proportionality between anticipated types of development and any related harms to the physical or biologic environment.⁶ In a word, this material does not meet the WAC 173-26-

⁶ See the briefing of the OSF petitioners for the statutory and constitutional requirements to meet nexus and proportionality.

201(3)(d) requirement “to ensure effective shoreline management provisions.”

Rather than CAPR selecting the portions of subsection 3.3.2 to focus on for its claim of a lack of useful analysis, CAPR will follow the Board’s choices in its approval of the SMP: “nutrient loading,⁷⁵ landslides,⁷⁶ climate change, and their effects on shorelines.⁷⁷” (FDO at 23; AR 7475.)

Preliminarily, it is conceded that all three are concerns in the Puget Sound area, but they are not problems effectively addressed by the buffer regime imposed by this SMP. Nor are they problems mainly associated with the simple developments typically found along these shorelines.

Note 75 respecting nutrient loading quotes page 3-30 of the Inventory:

“Nutrient loads from streams and rivers entering the nearshore are affected by the magnitude of river discharge, as well as watershed land uses. Major human sources of nutrients from upland areas include agricultural operations (animal manure, fertilizers), wastewater treatment plants and stormwater runoff from residential landscapes. Major anthropogenic sources of nutrients in Hood Canal include human sewage, stormwater runoff, chum salmon carcasses from hatchery returns, agricultural waste, and forestry.” [Internal cites omitted.]

The only other mention of residential landscaping in Chapter 3 is at page 3-46 (AR 6310, ln. 12) where it states “[i]mproper application, excessive concentrations, and overuse of pesticides, herbicides, and fertilizers are common in urban shoreline areas where manicured landscapes are desired

by landowners.” There is no quantification of what percentage of total nutrient loading is due to “improper,” “excessive,” and “overuse” of lawn chemicals. If these could be shown to be a problem, which is not done here, it is more a matter for public education than a reason for taking 150 foot marine and riparian buffers from every shoreline property owner in Jefferson County, “urban” or otherwise. Additionally, it is reasonable to presume that (public) wastewater treatment plants might be a bigger problem. However, they like forestry, agriculture, and the other items mentioned are already fully regulated under other laws. This is also true of residential septic systems which, as the County will attest, are carefully regulated by its Department of Health’s Onsite Sewage Program, ch. 18.15 JCC.

Note 76 respecting unstable buffs quotes page 3-34 of the Inventory:

The erosion of glacial and non-glacial sedimentary deposits has created high-elevation, often unstable bluffs along the shores of much of eastern Jefferson County. According to Ecology's recently digitized slope stability mapping (based on the 1970s Coastal Zone Atlas), 83 historic landslides were identified in the Jefferson County study area. Recent landslides were mapped at 327 locations.

Geologically hazardous areas in Jefferson County are already regulated by county ordinance pursuant to RCW 36.70A.030(9). And among the shoreline properties subject to the 150 foot buffer are low-bank properties where no such risk exists.

Note 77 respecting climate change quotes page 3-37 of the Inventory:

The Intergovernmental Panel on Climate Change predicts that between 1990 and 2100, average global surface temperature could increase from 2.5 to 10.4F, and global sea level could rise between 4 and 35 inches, depending on both the rate of natural changes and the response of the climate system to greenhouse gas emissions now and in the future (IPCC, 2006, as cited in King County, 2006). Increasing temperatures and sea levels are likely to impact shorelines of Jefferson County in multiple ways, as described below. [Speculation regarding future river flows omitted.]

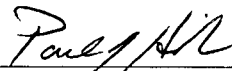
What 150 foot buffers will do to alleviate a 4 to 35 inch sea-level rise is not specified. Pages 3-36 to 3-39 of the Inventory (AR 6300-03) are devoted to climate change, but there is no discussion of how development of single-family residences or small businesses on the shorelands of Jefferson County are likely to be the cause of any effect on climate change.

III. CONCLUSION

The arguments of Futurewise and Washington Environmental Council should be rejected and the Board's approval of the SMP reversed.

Dated: July 6, 2016

Respectfully submitted,



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I certify that on the date indicated below I served the forgoing brief on the following counsel of record by USPS Mail, postage prepaid, or email where indicated.

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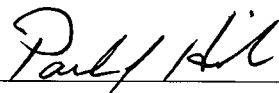
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STATE OF WASHINGTON

**RE: D2 476410: OLYMPIC STEWARDSHIP FOUNDATION V. WA STATE DEPT OF
ECOLOGY: CAPR ANSWER TO AMICUS BRIEF**

Dear Clerk Ponzoha:

Enclosed for filing are the original and a copy of the brief of Citizens' Alliance for Property Rights Jefferson County, Citizens' Alliance for Property Rights Legal Fund, Mats Mats Bay Trust, Jesse A. Stewart Revocable Trust, and Craig Durgan (collectively CAPR) answering the Amicus Brief of Futurewise and Washington Environmental Council. A Certificate of Service is attached to the brief.

Thank you,



Paul J. Hirsch